IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue, to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled cause on March 27, 1944, dismissing the petitioners' appeal as to the Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen. No review is sought of the Court of Appeals' judgment in so far as it dismissed the petitioners' appeal as to the National Mediation Board and its members.

OPINION BELOW

The *per curiam* opinion of the Court of Appeals, reported in 141 F. (2d) 366, appears in the printed record at pages 113-115.

JURISDICTION

The jurisdiction of the Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347(a)).

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C., Sec. 151 *et seq.*), are set forth in the Appendix to this petition.

STATEMENT OF THE MATTER

In 1941 the Pennsylvania Railroad Company (hereinafter called Pennsylvania) served notice upon the Order of Railway Conductors of America (hereinafter called ORC), as the bargaining representative of the craft of road conductors employed by Pennsylvania, and upon the Brotherhood of Railway Trainmen (hereinafter called BRT), as the bargaining representative of the craft of road brakemen employed by Pennsylvania, of its desire to revise the contract then governing the rates of pay and working conditions of each of those crafts. That contract had been negotiated with Pennsylvania in 1927 by ORC and BRT jointly, and they agreed to negotiate jointly its revision. Conferences between the two unions and the carrier began in May, 1941, and continued until August, 1942, when ORC withdrew in protest against alleged attempts by Pennsylvania and BRT to deprive it of its rights as bargaining agent for the road conductors. Thereafter Pennsylvania negotiated with BRT alone and on August 17, 1942, they executed a contract to become effective one month later. (R. 5-7.)

Within a week after its contract with Pennsylvania became effective, BRT filed with the National Mediation Board (hereinafter called Board) an application to be certified as the representative of the craft of road conductors employed by Pennsylvania (R. 17). In a letter addressed to the Board on October 26, 1942, ORC protested that a representation election should not be held among the conductors "at this time" for the reason that Pennsylvania and BRT were guilty of engaging in conduct prejudicial to ORC's reputation as a bargaining agent and such an election would not, therefore, be free of carrier interference and influence. The gravamen of the charges set forth in the letter was that for the purpose of persuading and inducing the road conductors to transfer the representation of their craft from ORC to BRT and in pursuance of a plan designed to accomplish that purpose, Pennsylvania and BRT have made [illegible] to certain facts, circumstances and reasons which they had purposefully brought into being and which they intended would influence the conductors to believe that BRT was a more successful bargaining agent than ORC. The facts and circumstances that Pennsylvania and BRT were charged with having created and publicized were, very briefly: BRT's success in securing a contract with Pennsylvania at [illegible] time [illegible] Pennsylvania's refusal to negotiate and bargain with ORC; BRT's success in having certain favorable terms included in its contract with Pennsylvania, such as the guarantee covering work [illegible] (and Pennsylvania's concomitant refusal to include similar terms in any contract with ORC); BRT's achievement in having included in its contract provisions governing the compensation of the conductors' extra board and provisions creating a new craft of "assistant conductors" whose duties were to be those theretofore performed by "additional" conductors (and ORC's loss to BRT of the exclusive right to negotiate with Pennsylvania regarding the conductors' extra board, and of the exclusive right to bargain with Pennsylvania respecting the duties theretofore per-

formed by "additional" conductors); and BRT's achievement in securing Pennsylvania's agreement to pay in full some 75 per cent of all BRT claims pending before the Railroad Adjustment Board. In the closing paragraph of the letter, ORC offered to present the Board with proof of its charges. (R. 23-33.)

On November 9, 1942, in response to ORC's letter of protest, the Board ruled that it had no alternative under the Railway Labor Act but to proceed with the conduct of a representation election. (R. 33-40.) The basis for its ruling is significant (R. 38-39):

> "The contentions which you make regarding the carrier's influence arise out of circumstances ante-dating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employee shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held.
>
> "In this comment on carrier influence, it seems unnecessary to do more than point out to you that the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act."

On November 27, 1942, ORC and four of its officers (collectively referred to hereinafter as petitioners) filed a complaint in the United States District Court for the District of Columbia against BRT and Pennsylvania. (R. 1-17.)[1] This complaint contained allegations substantially the same as the charges that had been set forth in ORC's letter of protest. It alleged that Pennsylvania and BRT had con-

[1] The two counts contained in this complaint were retained without change as Counts I and II of the amended complaint.

spired in an unlawful plan of action designed to discredit and weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative. (R. 14.) It alleged that, in pursuance of this plan, Pennsylvania and BRT invaded and encroached upon ORC's jurisdictional rights as representative of the conductors, by including in their contract of August 17, 1942, provisions creating a new class of "Assistant conductors" to do the work formerly done by "additional" conductors (in respect of whose work ORC had theretofore enjoyed the exclusive right to bargain with (Pennsylvania), and provisions regarding the composition and control of the conductors' extra board (the operation and maintenance of which had for many years been under the bargaining jurisdiction of ORC), and that Pennsylvania caused the contract containing these provisions to be rushed to publication and widely circulated among the conductors. (R. 7-12, 14-15.) It alleged that, pursuant to the plan and purpose aforesaid, Pennsylvania agreed to settle the claims for "assistant conductors" pay which had been filed with the Adjustment Board by BRT in behalf of its brakemen-members, and that Pennsylvania caused this settlement agreement to be widely circulated and publicized among the conductors. (R. 14, 15.) The complaint further alleged that Pennsylvania had engaged in dilatory tactics, had failed and refused to bargain and negotiate with ORC as the representative of the conductors, but had bargained respecting the working conditions of the conductors with BRT, not the conductors' representative; and that Pennsylvania intentionally delayed negotiations with ORC in order that BRT could cause a representation election to be held among the conductors at a time when ORC's reputation as a bargaining agent was impaired. (R. 12-13, 15-16.)

The complaint requested the Court to declare that ORC, as the representative of the craft of road conductors, had the exclusive right to negotiate with Pennsylvania respect-

ing the working conditions of that craft, and to enjoin Pennsylvania from directly or indirectly interfering with and influencing the conductors in their choice of a representative. (R. 21-22.)[2]

On December 2, 1942, six days after this complaint was filed, the Board ordered a representation election to be held among the conductors. BRT received the majority of the votes cast at the election and on December 27 the Board certified BRT as the duly designated representative of the craft. (R. 19.)

The petitioners thereupon amended their complaint by adding a third count thereto and joining the Board as a party defendant. (R. 17-22.) Count III recited what had occurred in the case after BRT's filing of an invocation with the Board on September 23, 1942, and alleged that the election and certification were invalid and should be set aside for two reasons: *First*, because the Board had failed and refused to perform its duty under the Railway Labor Act to determine whether Pennsylvania had, as charged, engaged in conduct constituting carrier interference and influence with the conductors' choice of a representative, and, *secondly*, because Pennsylvania had in fact engaged in conduct that interfered with and influenced the conductors' choice. (R. 19-20.)

The amended complaint added two paragraphs to the original prayer for relief, requesting (a) that the election and certification be set aside and (b) that the Board be enjoined from holding a further election until such time as it should determine that the conduct charged to Pennsylvania did not constitute carrier interference and influence or, in the alternative, that the conduct charged to Pennsylvania be declared to constitute carrier interference and influence and the Board enjoined from holding a further election until such time as it should determine that such interference and influence had ceased. (R. 20-21.)

[2] The prayer for relief in this complaint was incorporated without change in the prayer for relief in the amended complaint as paragraphs (3)-(9) thereof.

In answering this amended complaint, the Board protested that the election and certification could not be set aside on the ground that it had refused to investigate or consider the charges set forth in ORC's letter of protest, because those charges related to conduct ante-dating the election and it had no power or duty under the Railway Labor Act with respect to acts of carrier interference except those occurring during the actual conduct of an election. The Board contended that inasmuch as the conduct which ORC had charged to Pennsylvania did not occur during the holding of the election, the truth and validity of the charges should be determined by the District Court on a *de novo* trial. (R. 62-63, 73-74.)

In view of the fact that the answer of the Board admitted that it had held the election and issued the certification without investigating or considering ORC's charges, the petitioners in March, 1943, filed a motion for a summary judgment against the Board, requesting that the election and certification be set aside and the Board enjoined from holding a further election until such time as the Board should determine, after investigation and consideration of the conduct charged to Pennsylvania, that such conduct had ceased or would not interfere with the conductors in their choice of a representative. (R. 65-67.)

The motion was argued in May, and on June 11, 1943, the District Court,

> "* * * being of the opinion that there [was] no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, [did] not establish that the plaintiffs [had] a cause of action: * * *"

entered a judgment and order dismissing not only the motion for summary judgment, but the complaint and the amended complaint as well. (R. 89.)

Before the appeal from this judgment and order came on for argument, this Court entered decisions in three cases involving the Railway Labor Act, *Switchmen's Union Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou.-Pac. Co.*, 320 U. S. 338. In reliance upon those decisions, motions were filed to dismiss the appeal as to each of the respondents on the ground that neither the District Court nor the Court of Appeals had jurisdiction over the subject matter involved. (R. 92, 95-99, 104-105.)

In opposing these motions, the petitioners conceded that under this Court's decisions in the above cases the District Court and the Court of Appeals may have had no jurisdiction to consider the issue raised by the motion for summary judgment—whether the election and certification should be set aside for the reason that the Board had conducted the election and certified the winner without first investigating or considering ORC's charges of carrier interference. *The petitioners contended that the Courts did have jurisdiction, however, to consider the other issue raised by the pleadings —whether the election and certification could be set aside for the reason that prior to the holding of the election Pennsylvania had in fact engaged in conduct that interfered with and influenced the choice exercised by the conductors at the election.* It was urged that the "right" guaranteed to employees by Section 2, Third, of the Act—the "right" to select representatives "without interference, influence or coercion" by the carrier—can be violated by carrier conduct occurring *prior* to the holding of an election as well as by carrier conduct occurring *during* the holding of an election; that the Board had held it had no power to enforce this right against acts of carrier interference occurring prior to the holding of an election; that this Court in the *Switchmen's Union* case, *supra*, reaffirmed the principles laid down in *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, *Virginian Ry.* v. *Federation*, 300 U. S. 515, and acknowledged a power in the federal courts to enforce this right against acts of carrier inter-

ference when the right would otherwise be obliterated; and that the federal courts' power in this regard necessarily is sufficiently broad to include the power to annul a certification if annulment of the certification is essential to the effective enforcement of the right.

On March 27, 1944, the Court of Appeals decided *per curiam* that the appeal should be dismissed as to all parties, holding that while the Board had misinterpreted the Railway Labor Act in ruling that it had no jurisdiction with respect to acts of carrier interference occurring prior to the actual conduct of the election, the courts lacked the power to consider the case or grant the relief requested. The Court of Appeals based its decision on this Court's decisions in the *Switchmen's Union*, *Southern Pacific*, and *M-K-T* cases, *supra*, construing those cases as holding that under no circumstances may an election or certification be set aside by the federal courts—whether because of arbitrary action by the Board or, as in this case, to enforce the right of employees to choose a representative without interference by the carrier. (R. 113-115.)

The facts of this case, as posed by the pleadings, which warrant the issuance of a writ of certiorari, are:

1. By its conduct prior to the holding of the election, Pennsylvania interfered with and influenced the election at which BRT was selected as the conductors' representative.

2. The Board has maintained that "as a matter of law" it had no power to investigate or consider Pennsylvania's conduct, because such conduct occurred prior to the holding of the election.

3. The Court of Appeals held, on the authority of the *Switchmen's Union* and companion decisions, that the courts are without power to enforce the right of employees to choose a representative without interference by the carrier, where enforcement requires the nullification of an election and certification.

This petition does not solicit the Court to reconsider its recent decisions in *Switchmen's Union* v. *Board*, *General*

Committee v. *M.-K.-T. R. Co.* and *General Committee* v. *Sou. Pac., supra*, in so far as those decisions establish that the federal courts have no power to review action taken by the Board pursuant to Section 2, Ninth, of the Railway Labor Act and preliminary to issuing a certification. *The petitioners concede that the Board's ruling in the instant case that it has no power under Section 2, Ninth, to investigate or consider acts of carrier interference which occur prior to the actual conduct of a representation election, is unreviewable.* The petitioners are contending that Section 2, Third, of the Act insures to employees an enforceable right to be free of all acts of carrier interference, irrespective of *when* such acts occur; that if the Board has no power to protect the right from violation by acts of carrier interference occurring prior to the actual conduct of an election, the federal courts necessarily have the power to enforce the right against such prior acts; and that the federal courts' power to enforce the right includes the power to nullify a certification, if nullification is necessary to effectively enforce the right.

QUESTIONS PRESENTED.

1. Do the federal courts have the power to set aside a certification issued by the Board if the carrier, prior to the holding of the election, engaged in conduct which interfered with and influenced the choice exercised by the employees at the election—conduct which the Board said "as a matter of law" it had no jurisdiction to investigate or consider?

2. Does the "right" guaranteed to employees by Section 2, Third, of the Railway Labor Act to select representatives without "interference, influence or coercion" by the carrier, include merely the right to be free of acts of carrier interference occurring *during* the holding of a representation election, or does it include also the right to be free of a carrier's acts which, though they occur *prior* to the election, interfere with the choice exercised by the employees at the election?

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals is contrary to this Court's decisions in *Virginian Ry.* v. *Federation*, 300 U. S. 515, and *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, wherein the right guaranteed to employees by Section 2, Third, of the Railway Labor Act was declared to be judicially enforceable. Further, the decision of the Court of Appeals in the instant case does not give proper effect to the decisions of this Court in *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338.

2. The effect of the decision of the Court of Appeals is to destroy the principal right guaranteed employees by the Railway Labor Act—the right to select a bargaining representative without carrier interference, influence and coercion. A determination by this Court as to the existence and enforceability of the right of freedom of choice in the selection of bargaining representatives, is of vital concern to more than one million railway employees.

WHEREFORE, the petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the District of Columbia entered in this case March 27, 1944.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PRELIMINARY STATEMENT.

We refer to the foregoing petition for a citation of the opinion below, a statement of the grounds of jurisdiction, a citation of the statute involved and a summary statement of the case.

ARGUMENT.

I.

The Decision of the Court of Appeals in the Instant Case Does Not Give Proper Effect to Applicable Decisions of This Court.

In the instant case, ORC protested to the Board that a representation election should not be held among the conductors "at this time" for the reason that Pennsylvania and BRT were guilty of engaging in conduct prejudicial of ORC's reputation as a bargaining agent and such an election would not, therefore, be free of carrier interference and influence. The Board ruled, however, that it had no jurisdiction under the Railway Labor Act to consider ORC's charges—that its power with respect to carrier interference was limited to acts of interference occurring "during the time of taking a secret ballot" and "within a prescribed area," and that ORC's charges related to acts ante-dating the invocation of the Board's services. Without ever investigating or considering ORC's charges of carrier interference, the Board held an election among the conductors and certified the winner, BRT, as the conductors' representative. The Court of Appeals decided that although the Board was derelict in holding an election without first investigating ORC's charges of carrier interference, the petitioners' appeal should be dismissed

> "on the authority of the decision of the Supreme Court in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297."

It was the Court of Appeals' opinion that

> "after the election had been held and the majority of the votes had been cast and counted for [BRT] and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the *Missouri-Kansas* and *Southern Pacific* cases decided the same day, as we

understand their purport, foreclose the question we have here and deprive the courts of all right of interference."

A. We believe that the Court of Appeals' decision is contrary to this Court's decisions in *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, and *Virginian Ry.* v. *Federation*, 300 U. S. 515.

Texas & N. O. R. Co. v. *Ry. Clerks*, *supra*, involved a suit which had been brought to enjoin a carrier from "interfering with, influencing and coercing" its employees in the designation of representatives in violation of Section 2, Third, of the Railway Labor Act of 1926. The District Court issued an injunction (25 F. (2d), 876 (S. D. Tex.)), the Fifth Circuit Court of Appeals held that the injunction was properly granted (33 F. (2d), 13), and this Court affirmed. In the course of his opinion, Mr. Chief Justice Hughes stated (281 U. S., p. 569):

> "* * * Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached, and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated."

Virginian Ry. Co. v. *Federation, supra*, involved a suit which had been brought under the Railway Labor Act, as amended in 1934, to (1) compel a carrier to "treat with" the plaintiff, the certified representative of a craft of the carrier's employees, as required by Section 2, Ninth, and (2) to enjoin the carrier from "interfering with, influencing and coercing" its employees in their choice of a representative in violation of Section 2, Third. The District Court entered a decree directing the carrier to "treat with" the plaintiff and restrained the carrier from "interfering with, influencing or coercing" its employees in their choice of a representative (11 F. Supp. 621 (E. D. Va.)), and the Fourth Circuit Court of Appeals sustained the decree (84 F. (2d) 641). On certiorari, this Court stated (300 U. S., pp. 543-544):

> "The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks Case, supra*, and of the unambiguous language of § 2, Third, and Fourth, of the Act, as amended."

Speaking for a majority of this Court in *Switchmen's Union* v. *Board*, 320 U. S. 297, Mr. Justice Douglas said with reference to the *Clerks* and *Virginian Ry.* cases (320 U. S., p. 300):

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that

> but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose."

In his opinion in *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, Mr. Justice Douglas made further reference to the *Clerks'* case, stating (320 U. S., p. 327):

> "* * * But Congress also supported its policy with the imposition of some rules of conduct for breach of which the courts afford a sanction. Thus Congress stated in §2, Third, of the 1926 Act that the choice by employees of their collective bargaining representatives should be free from the carriers' coercion and influence. That 'definite statutory prohibition of conduct which would thwart the declared purpose' of the Act was held by this Court in the *Clerks* case to be enforcible in an appropriate suit. 281 U. S. 548, 568."

In the *Clerks'* case this Court decided that the right guaranteed to employees by Section 2, Third, of the Railway Labor Act of 1926 is judicially enforceable, and it is evident from this Court's opinion in the *Virginian Ry.*, *Switchmen's Union* and *M-K-T* cases that the 1934 amendments to the Railway Labor Act did not modify the force and effect of that decision. This Court's opinion in the *Clerks'* case does not suggest that the power of the federal courts to enforce this right is limited and no limitation is suggested in this Court's opinions in the *Virginian Ry.*, *Switchmen's Union* and *M-K-T* cases. See *Stark* v. *Wickard*, 321 U. S. 288, 303. The Court of Appeals' decision in the case at bar is contrary to the accepted meaning of this Court's decision in the *Clerks* and *Virginian Ry.* cases, as the Court of Appeals denied the existence of power in the federal courts to enforce and protect the conductors' right to be free from acts of carrier interference occurring prior to the election.

B. We believe further that the Court of Appeals' decision in the instant case gives improper effect and application to this Court's decisions in *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*; and *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338.

In the case at bar, the Board, ruling that it had no power to protect the right of freedom of choice from carrier interference occurring prior to the holding of an election, ordered and sponsored a representation election among the conductors and certified the winner as the conductors' representative. On the authority of the *Switchmen's Union* and companion decisions, *supra*, the Court of Appeals held that notwithstanding the fact that, prior to the holding of the election, Pennsylvania engaged in conduct which interfered with and influenced the choice exercised by the conductors at the election, the courts have no power to set aside the certification. This means, of course, that neither the Board nor the federal courts have the power to enforce the right guaranteed to employees by Section 2, Third, of the Railway Labor Act to choose a representative without interference by the carrier, *whenever such interference is accomplished by the carrier prior to the actual exercise of the choice.* This virtually obliterates the right of employees to a freedom of choice, for it is common knowledge that employer interference almost always occurs prior to employee elections.[3]

We think no such a result is required by this Court's decisions in the *Switchmen's Union*, *Southern Pacific* and *M-K-T* cases. Rather, we think those decisions require the opposite result, as they expressly recognize that the federal courts will enforce a right guaranteed by the Railway Labor Act if the right would otherwise be obliterated.

[3] It is no answer to suggest that such acts of interference and influence may be enjoined by federal courts, for the effects of such interference are of a continuing nature and unless the election is postponed or can be set aside upon a showing that it was not free but was influenced, the right is lost.

This Court viewed the *Switchmen's Union, supra,* case as a suit brought to enforce the right guaranteed by Section 2, Fourth, of the Railway Labor Act—the "right" of a "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class," and ruled that the federal courts have no power to entertain such a suit. The problem posed was whether the broad grant of general jurisdiction embodied in Section 24(8) of the Judicial Code empowers a federal court to review a Board determination affecting the "right" which Congress created when it enacted Section 2, Fourth, of the Railway Labor Act. Recognizing that "it is for Congress to determine how rights which it creates are to be enforced," this Court regarded the problem as one of Congressional intent and concluded that Congress did not intend that Section 24(8) of the Judicial Code should empower the federal courts to enforce the right in question. As we understand the majority opinion, two steps are involved in the analysis which led this Court to this conclusion:

(1) Where the absence of jurisdiction of the district courts would mean the sacrifice or obliteration of a right which Congress has created, there is a strong inference Congress intended that Section 24(8) of the Judicial Code should empower district courts to enforce the right.

(2) It cannot be inferred that Congress intended that Section 24(8) of the Judicial Code should empower district courts to enforce the "right" of a "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class," however, because Congress provided in Section 2, Ninth, of the Railway Labor Act for the protection of that right by empowering the Board to resolve controversies concerning it.

The evolution and structure of the Railway Labor Act were drawn upon by the majority to confirm the view that Congress contemplated the right would be fully protected and enforced by Section 2, Ninth.

The same analysis led this Court to decide in the *M-K-T* and *Southern Pacific* cases, in which the federal courts had been called upon to define the boundary line between two crafts, that no judicially enforceable rights were involved.

That our understanding of these cases is correct, is borne out by the following excerpt from this Court's opinion in *Stark* v. *Wickard*, 321 U. S. 288, 306-307:

> "* * * Under the unusual circumstances of the historical development of the Railway Labor Act, this Court has recently held that an administrative agency's determination of a controversy between unions of employees as to which is the proper bargaining representative of certain employees is not justiciable in federal courts. *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323. Under the same Act it was held on the same date that the determination by the National Mediation Board of the participants in an election for representatives for collective bargaining likewise was not subject to judicial review. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297. This result was reached because of this Court's view that jurisdictional disputes between unions were left by Congress to mediation rather than adjudication. 320 U. S. 302 and 337. That is to say, no personal right of employees, enforcible in the courts, was created in the particular instances under consideration. 320 U. S. 337, 64 S. Ct. 152. But where rights of collective bargaining, created by the same Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially. 320 U. S. 330, 331. Cf. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515.
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> "It was pointed out in the *Switchmen's* case that:
>
> "'If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.' 320 U. S. at 300."

Thus, the *Switchmen's Union* case involved a suit to enforce the right guaranteed by Section 2, Fourth, of the Act, while the instant case involves a suit to enforce the right provided for in Section 2, Third, of the Act, and in the former case this Court did not consider or decide the question whether the federal courts have the power to entertain a suit brought to enforce the right here involved. Indeed, if this Court's reasoning in the *Switchmen's Union* case is applied to the instant case, the conclusion is inescapable that the Courts did have jurisdiction to entertain the instant suit and that the Court of Appeals' decision is in consonant with the *Switchmen's Union* decision. It must be inferred that Congress intended that Section 24(8) of the Judicial Code empowered the courts to entertain the instant suit, because the absence of such power would mean a sacrifice or obliteration of the right which Congress created when it enacted Section 2, Third, of the Railway Labor Act. There would be a sacrifice of this right if the courts were without such power, because the Board has determined that Section 2, Ninth, of the Railway Labor Act does not authorize it to protect the right from acts of carrier interference ante-dating the actual conduct of an election.

The conclusion that the courts have jurisdiction to entertain the instant suit is not incompatible with the proposition that the federal courts have no power to review action taken by the Board preliminary to issuing a certification and pursuant to provisions of Section 2, Ninth (a proposition which derives from the *Switchmen's Union* decision). While the courts may lack the power to set aside the Board's certification on the ground that the Board failed to investigate or consider ORC's charges of carrier interference, the courts are not precluded from setting aside the certification on the ground that prior to the election Pennsylvania in fact interfered with and influenced the choice exercised by the conductors at the election.

II.

The Decision of the Court of Appeals in the Instant Case Negatives the Statutory Guarantee Against Carrier Interference.

One of the major purposes of the Railway Labor Act is (Section 2 (Clause 3)) "to provide for the complete independence of carriers and of employees in the matter of self-organization." The achievement of this purpose is implemented by Section 2, Third, which provides that

> "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by inference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

and by Section 2, Ninth, which provides that

> "* * * the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

In the instant case, the Court of Appeals disagreed with the Board's ruling that it has no authority under the Act with respect to acts of carrier interference ante-dating the actual conduct of a representation election, but the Court disclaimed any power to require a modification by the Board of its ruling and the Court further disclaimed any power to consider whether acts of carrier interference had

occurred prior to the election in question. This decision necessarily operates to leave the right unprotected from acts of carrier interference ante-dating the conduct of an election; it operates to permit a carrier to interfere with its employees' choice of a representative at all times except during the brief period in which the choice is exercised. The accepted meaning of Section 2; Third, is that acts of carrier interference are illegal, irrespective of when they occur. See *Texas & N. O. R. Co.* v. *Clerks, supra; Virginian Ry.* v. *Federation, supra.*

CONCLUSION.

Without undertaking at this time to present an adequate argument on the merits, we submit that the petition for writ of certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the District of Columbia in this case.

Respectfully submitted,

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APPENDIX.

Excerpts from the Railway Labor Act

(Act of May 20, 1926, as amended by Act of June 21, 1934, 45 U. S. C., Sec. 151, *et seq.*)

Section 2. * * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who

after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.